SUPREME COURT, U.S.
FILED
JUL 5 - 2005
OFFICE OF THE CLERK

No. 05 56

IN THE

Supreme Court of the United States

MARY O'BRIEN,
PETITIONER

v.

LUCAS ASSOCIATES PERSONNEL, INC.,
DOING BUSINESS AS LUCAS GROUP,
LUCAS ASSOCIATES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN E. WALL, JR.
Counsel of Record
LAW OFFICES OF JOHN E. WALL, JR.
5728 Prospect Avenue
Suite 2001
Dallas, Texas 75206
(214) 887-0100 *telephone*
(214) 887-0173 *facsimile*
Attorneys for Petitioner

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTIONS PRESENTED FOR REVIEW

1. In a Rule 56 summary judgment setting involving an employment discrimination case, is it improper for the Circuit or Trial court to substitute its opinion for that of the ultimate fact-finder and conclude that inconsistent and conflicting testimony by the movant-employer's representatives, does not present material issues of fact when the employer claims the employee quit, which assertion was controverted by the employee's retention of a letter of termination, therefore making one or all of the employer's witnesses not worthy of belief?

2. In an employment discrimination case, is it error to grant a Rule 56 summary judgment motion when the summary judgment evidence demonstrates equally plausible factual inferences from proven facts, being either discrimination or no discrimination, especially when the employer's affiants have demonstrated inconsistent positions regarding the stated reason for discharge and the affidavit assertions are belied by the employer's affiants handwritten notes made earlier in time, thereby at least establishing the requisite suspicion of mendacity?

3. Does the Fifth Circuit's opinion in *O'Brien* which resolves credibility issues in favor of the movant-employer (by explaining the inconsistencies away as unsupported by the record [there was support] or so trivial as to be immaterial), ignore this Court's decision in *Reeves v. Sanderson*

Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) which: (1) clearly places credibility determinations within the province of the fact-finder; (2) permits the fact-finder to infer the ultimate finding of unlawful discrimination based on the *prima facie* case combined with sufficient evidence of the falsity of the stated reason for the employment action and (3) requires no additional independent evidence of discrimination?

4. Do the conflicting opinions of the Fifth Circuit regarding the plaintiff's burden in the summary judgment setting involving an employment discrimination case undermine the principle of *stare decisis* to the point it deprives litigants of the ability to accurately consider the merits of liability, particularly when as here, the Fifth Circuit, begrudgingly concedes a *prima facie* case, and then concludes the employee's claim is so merit less that the case is remanded for an assessment of attorney fee, even though the trial court previously declined to assess attorney fee?

5. Whether this Court's opinion in *Desert Palace Inc., v. Costa* which when coupled with uncontroverted evidence of mixed motive, obliges the employer to prove the same decision would have been made without the improper influence, which, when coupled with conflicting evidence on the central issue i.e. did the employee quit or was she fired, always renders the issue one of a question of fact?

6. Whether the Fifth Circuit comports with this

Court's rulings in *Reeves v. Sanderson Plumbing Products, Inc.*, *Anderson v. Liberty Lobby, Inc.*, and *Lytle v. Household Manufacturing, Inc.*, inasmuch as in this case, the Fifth Circuit makes credibility determinations, weighs evidence , performs functions of the fact-finder and when weighing the evidence concludes the evidence is non-existent, conclusory, subjective belief and non-probative without any explanation and not referencing any of the evidence offered in opposition, which in this case consisted of 69 pages of evidence?

7. In the summary judgment matrix, are the circuit courts, which reject the non-movant evidence required to articulate the evidence offered and the reasons for the conclusion the non-movant evidence is so weak it could never be probative of unlawful discrimination, in other words, should the trial court and / circuit court set out the evidence offered by the non-movant and state why the evidence is not material or so weak it could never raise a material issue of fact?

8. When comparator evidence is used as a form of circumstantial evidence to establish discrimination, must the comparable employee be involved in nearly identical circumstances in order for the evidence to be received and considered?

9. Can a Circuit Court reverse and remand solely on the issue of attorney fee and costs for a prevailing employer although not having found

the action was frivolous, brought in bad faith, unreasonable and particularly after the Circuit Court concludes the Plaintiff made a *prima facie* case?

PARTIES TO THE PROCEEDING

The following is a list of all parties to the proceedings in this case in the United States

Court of Appeals for the Fifth Circuit:

A. Mary O'Brien, Plaintiff-Appellant-Cross-Appellee
B. John E. Wall, Jr., Attorney for Plaintiff-Appellant-Cross Appellee
C. Lucas Associates Personnel, Inc., doing business as Lucas Group; Lucas Associates, Inc., Defendants-Appellees-Cross Appellants
D. Stephen E. Fox and the Law Firm of Fish & Richardson, P.C., Attorneys for Defendants-Appellees-Cross-Appellants.

John E. Wall, Jr.
Attorney of Record for Petitioner

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING v

TABLE OF CONTENTS vi

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

APPLICABLE CONSTITUTIONAL PROVISIONS, RULES AND STATUTES 1

STATEMENT OF THE CASE 4

ARGUMENT: REASONS FOR ALLOWANCE OF THE WRIT 18

CONCLUSION 29

APPENDIX

CIRCUIT COURT OPINION (04/05/05) 1a

DISTRICT COURT MEMORANDUM OPINION AND ORDER (05/18/04) 14a

TABLE OF AUTHORITIES

CASES

ABRAMSON V. WILLIAM PATTERSON COLLEGE OF NEW JERSEY, 260 F.3D 265 (3RD CIR. 2001) 20

BLOW V. CITY OF SAN ANTONIO, 236 F.3D 293, 298 (5TH CIR. 2001) 20

CELOTEX CORP. V. CATRETT, 477 U.S. 317, 324, 106 S.CT. 2548, 2553, 91 L.ED.2D 265 (1986) 26

CHRISTIANBURG GARMENT CO. V. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 434 U.S.412 (1978) 29, 30

CHUANG V. UNIV. OF CAL. DAVIS, 225 F.3D 1115 (9TH CIR. 2000) 20

EEOC V. HORIZON/CMS HEALTHCARE CORP., 220 F.3D 1184 (10TH CIR. 2000) 20

ERCEGOVITCH V. GOODYEAR TIRE & RUBBER, CO., 154 F.3D 344 (6TH CIR 1998) 28

EVANS V. CITY OF BISHOP, 238 F.3D 586, 590 (5TH CIR. 2000) 20

FIERROS V. TEXAS DEPARTMENT OF HEALTH, 274 F.3D 187 (5TH CIR. 2001) 20, 26

MCDONALD V. SANTA FE TRAIL TRANSP.CO., 427 U.S. 273 (1976) 27

MURRELL V. OCEAN MECCA MOTEL, INC., 262 F.3D 253 (4TH CIR. 2001) 20

ORNELAS V. UNITED STATES, 116 S.CT. 657 (1996) 28

RATLIFF V. CITY OF GAINESVILLE, TEXAS, 256 F.3D 355 (5TH CIR. 2001) 20

REEVES V. SANDERSON PLUMBING PRODUCTS, INC., 530 U.S. 133, 120 S.CT. 2097, 147 L.ED.2D 105 (2000) ..... *passim*

RIVERA-RODRIGUEZ V. FRITO LAY SNACKS CARIBBEAN, 265 F.3D 15 (1ST CIR. 2001) 20

RUSSELL V. MCKINNEY HOSPITAL VENTURE, 235 F.3D 219, 223(5TH Cir. 2000) 20

ST. MARY'S HONOR CENTER V. HICKS, 509 U.S. 502, 517, 113 S.CT. 2742, 125 L.ED.2D 407 (1993) 21

VANCE V. UNION PLANTERS CORP., 209 F.3D 438, 442 & N.3(5TH Cir. 2001) 26

MISCELLANEOUS

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 4

28 U.S.C. § 2101(c) 1

29 U.S.C. § 633 ..... 2, 17

42 U.S.C. § 2000e 2, 17

42 U.S.C. § 2000e-5(c) 2, 17

42 U.S.C. § 12101 3

Federal Rule of Civil Procedure 56 1

Texas Labor Code § 21.001 ..... 2, 4

Texas Labor Code § 21.051 3

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirmed the decision of the United States District Court for the Northern District of Texas, which granted summary judgment in favor of the Respondent. The Fifth Circuit also reversed and remanded for an assessment of attorney fee as costs. The Fifth Circuit's April 5, 2005 opinion is printed here as 1a-13a. The District Court's May 18, 2004 memorandum opinion and order are printed here as 14a-29a.

STATEMENT OF JURISDICTION

This Petition for a Writ of Certiorari seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit entered on April 5, 2005.

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). This Petition for Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).

APPLICABLE CONSTITUTIONAL PROVISIONS, RULES AND STATUTES

1. The rules applicable to this case are as follows:

Federal Rule of Civil Procedure 56

Rule 56. Summary Judgment

. . . .

(c) Motion and Proceedings Thereon. . . . . The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . . .

. . . .

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by deposition, answers to interrogatories or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise specified in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

2. The statues applicable to this case are as follows:

Texas Labor Code § 21. 001 Purposes:

The general purposes of this chapter are to:

(1) provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments (42 U.S.C. § 2000e *et seq.*);

(2) identify and create an authority that meets the criteria under 42 U.S.C. § 2000e-5(c) and 29 U.S.C. § 633;

(3) provide for the execution of the policies

embodied in Title I of the Americans With Disabilities Act of 1990 and its subsequent amendments (42 U.S.C. § 12101 *et seq.*);

(4) secure for persons in this state, including persons with disabilities, freedom from discrimination in certain employment transactions, in order to protect their personal dignity;

(5) make available to the state the full productive capacities of persons in this state;

(6) avoid domestic strife and unrest in this state;

(7) preserve the public safety, health, and general welfare; and

(8) promote the interests, rights, and privileges of persons in this state.

Texas Labor Code § 21. 051 Discrimination by Employer

An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer:

(1) fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment; or

(2) limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee.

STATEMENT OF THE CASE

Basis for Federal District Court Jurisdiction:

Petitioner, Mary O'Brien ("O'Brien") brought suit against her former employer, Respondent, Lucas Associates Personnel, Inc., doing business as Lucas Group; Lucas Associates, Inc., (" Lucas") pursuant to the Texas Commission on Human Rights Act ("TCHRA"), Tex. Lab. Code Ann. § 21.001 claiming sex discrimination/retaliation. Jurisdiction was proper in the United States District Court for the Northern District of Texas pursuant to 28 U.S.C. § 1331. The trial Court granted summary judgment in favor of Lucas. O'Brien appealed and Lucas cross-appealed seeking a reversal and remand for assessment of attorney fee. The Fifth Circuit affirmed and remanded for an assessment of attorney fee even though Lucas never submitted any evidence to the trial court warranting fee nor was there evidence of bad faith, unreasonableness or vexation.

Facts Material to Consideration of the Questions Presented:

[All of the facts are contained in O'Brien's 9 Page Declaration which was before the trial court and were supported by documentary evidence]. Most, if not all these facts were not recounted by the courts below.

In the Beginning

"O'Brien began her employment with Lucas in February of 1997. She was hired to improve the poor productivity that had been ongoing for a long period of time in the Dallas Office. When O'Brien hired on at Lucas, she had applied for a position that was open in the Chicago Office. O'Brien was hired with the promise of a short term stay in Dallas of approximately one year and a paid move back to Chicago to open a Chicago branch when the Dallas Office became more profitable.

Needless to say, after one year, that did not occur. The Dallas branch not only became profitable, but the most profitable branch in the company. From the time O'Brien began in 1997 until 2001, O'Brien received numerous awards while employed at Lucas and was always one of the top performers.

The Reason for Termination

Lucas claimed that O'Brien was allegedly given a year to improve employee turnover and her management abilities. Lucas claimed that in May, 2000 O'Brien was counseled regarding the alleged issue of employee turnover. Lucas claimed that one of O'Brien's supervisors, deMartino made it "clear" that after O'Brien was relieved of her management duties in May, 2001, that O'Brien could continue her employment with Lucas in a Recruiter job. The parties' position regarding the cessation of O'Brien's employment differed significantly. Lucas claimed that the O'Brien abandoned her job. Contrary to Lucas' claim, O'Brien still possessed an "Employment Termination Agreement" dated May 15, 2001 which was given to O'Brien to terminate her employment. O'Brien declined to sign the "Agreement" and Lucas hoping that she did not possess the document, maintained to the trial court that O'Brien was not terminated but rather just abandoned her job. When Lucas learned that O'Brien still possessed a copy of the Agreement, it was straddled with its first self-inflicted credibility injury.

The Industry and O'Brien's Influence

The recruiting industry is a commission sales industry and traditionally experiences one of the highest turnover rates in the sales world. Recruiting sales, is selling intangibles versus selling tangible commodities The pressure to perform and build was

extreme, especially with Lucas, where the advance draw amounts must be covered with billing to the clients. For that reason, it takes time, unless the recruiter has prior experience, to ascertain whether or not that person will become a good recruiter. The only way to determine if that person will be a good recruiter is to work with them and see if they are able to fulfill the requirement. In that regard, O'Brien spent many hours working with her staff. She provided them goals and expectations on a regular basis. O'Brien's staff was given a yearly billing goal and those goals were monitored on a weekly basis. When any placement was made, O'Brien provided an office wide celebration for that employee

Male/Female Differences

Each successive year after the commencement of O'Brien's employment in 1997, sales improved in her search division. While O'Brien was the branch manager, she came to an office that was ongoing although not profitable. In the Dallas office and other offices, O'Brien's male counterparts were experiencing high turnover and nothing was done about the issue. For instance, Mr. Devereaux, who was the General Manager of the military division and was equal to O'Brien's position in the military section of the Dallas Office, was physically and verbally abusive to his researchers. He would commonly use lewd, profane language in the office. The Devereaux group worked in the same area as O'Brien's search group. O'Brien heard and saw the abuse Devereaux heaped on his employees. Devereaux made physical threats against some of the recruiters. Devereaux had the highest rate of recruiter turnover in the Dallas Office. Devereaux was not forced to see a counselor for his infractions prior to O'Brien's termination. Devereaux would also permit his

employees to display pictures of scantly clad and partially nude women in their area of the office. It was not uncommon for Devereaux's recruiters to openly discuss sex stories and tell jokes about females.

Because of the climate that existed due to Devereaux's attitude towards women, O'Brien lost a recruiter named Lana Smith. Smith was offended by the exposure to that behavior. When O'Brien sent a letter to Cathy deMartino referencing this conduct, O'Brien was told to pick her battles carefully. O'Brien mentioned that the women in the office did not appreciate that kind of conduct. Once again, the mention of this information received no favorable or remedial response. DeMartino also informed O'Brien that "this" went on in all Lucas' offices and just to deal with it.

In February of 2000, O'Brien's mother was diagnosed with terminal cancer. O'Brien repeatedly asked or requested a managerial benefit of a 30 day sabbatical to care for her mother. O'Brien was denied on every occasion. The 30 day sabbatical was purportedly designed to provide managers with three years of good service an opportunity for an extended vacation. No male managers were ever denied this sabbatical. O'Brien was told that she could visit her mother on weekends which meant that she would have to fly to Chicago on Friday night and return on Sunday so she could be in Dallas early Monday morning. O'Brien was denied the privilege of assisting her family and caring for her mother. This treatment was in stark contrast to O'Brien's male counterparts who were allowed as much time off generally as they desired. One case in particular involved, Tony Tommarello, who was allowed time away from work for golf outings. Mr. Tommarello likewise had a very high turnover rate in

his office. Mr. Tommarello was notorious for hiring what he called "babes" who were generally women in their twenties who would become the victims of his sexual advances. Mr. Tommarello, because of the way he operated his office, experienced a high turnover rate because of the hostile work environment. O'Brien was told by both Cathy deMartino and Andi Jennings (officers in the company) about Mr. Tommarello's high turnover and charges of sexual harassment filed with the EEOC. No disciplinary action has ever been taken against Mr. Tommarello for those events as explained to O'Brien by deMartino. Jeff Chaponick is but another instance of preferential treatment of males at the Lucas Group. Jeff Chaponick was hired over O'Brien's objection. Art Lucas hired Chaponick thinking Chaponick was a big biller. Chaponick was, but the problem was the invoices Chaponick submitted were fraudulent. Chaponick handled the General Motors account. Chaponick would send invoices to GM that would be paid, although Chaponick had done absolutely no recruiting to justify the bill. When it was brought to the attention of deMartino and Art Lucas, that Mr. Chaponick was essentially fraudulently billing General Motors, deMartino shrugged it off as inconsequential because Art Lucas liked his macho image. Once it was discovered that Chaponick was doing this, O'Brien was required, and she did, as a part of her responsibility, to assuage the client concerns. Lucas was forced to acknowledge approximately $1,000,000.00 that Chaponick had billed without any work having been performed. Chaponick was not required to refund the money he had drawn against the billing. O'Brien requested permission from Art Lucas to fire Chaponick. Lucas refused the request. Even though Chaponick fraudulently billed General Motors, he was not

terminated nor disciplined by either deMartino or Lucas, the same persons who purportedly made the decision to terminate O'Brien. In fact he assumed O'Brien's job.

In July of 2000, O'Brien was told that she must attend a company meeting in New Orleans, LA. By this point, the condition of O'Brien's mother had deteriorated seriously. O'Brien was told by deMartino that she must attend, despite her mother's illness. O'Brien advised deMartino that she could not attend as her mother had only days left to live. deMartino replied: "Oh, she could hang on for months and if you do not go you may not have a job to return to." Nevertheless, O'Brien did not go to New Orleans and unfortunately her mother's life ended approximately three days later. O'Brien was later told by deMartino that O'Brien didn't miss anything because most of the time at the meeting was devoted to personal activities, including sight seeing trips, visits to casinos, riverboat ride and carousing in the French Quarter. After not attending the meeting in New Orleans, it was then that O'Brien was advised to see a "Management Coach." O'Brien chose Ana Beth Benningfield. O'Brien was told by deMartino that her priorities were not in sync with the Lucas Group. O'Brien attended many sessions with Ms. Benningfield who, for the most part, counseled her on the loss of her mother. Benningfield also provided O'Brien guidance on how to protect her in such an environment that degraded women. As a result of her meeting with the Coach, O'Brien submitted to her employees questionnaires. These were denominated Manager's Request for Feedback and were submitted to O'Brien's employees in October, 2000.

Evidence Controverting the Exit Interviews Which Allegedly Gave Rise to the Alleged "Job Abandonment"

One questionnaire which refuted the "exit interviews" was completed by Ron Cohen, who Lucas maintains was very vitriolic regarding O'Brien when he left Lucas' employ. Mr. Cohen's statement is self-explanatory, however, as he points out, O'Brien was approachable and Cohen was very complimentary of her management style. Quite telling in the October 2000 entry is Mr. Cohen's suggestion that Jeff Chaponick be fired.

Jeff Tubbs also submitted a Response to O'Brien's Manager's Survey. Tubbs indicated in his Response, which likewise was provided to the trial court, that O'Brien received an A+ for exercising the open door policy. Tubbs was fired by O'Brien at the direction of Art Lucas. Art Lucas would periodically come to town and sit next to Tubbs' cubical and then come tell O'Brien that Tubbs was lazy. O'Brien was sure Tubbs unfortunately felt as though his termination came from her. It was not O'Brien's decision to terminate Tubbs' employment. O'Brien experienced a good relationship with Tubbs and she was sure when he was fired he felt like O'Brien had mislead him.

Chris Dowd resigned from Lucas and was not terminated by O'Brien. Chris Dowd in response to the manager's feedback stated "that O'Brien was very available, helpful and willing to listen." He had no negative comments regarding the management of his position. Dowd was given the Blockbuster account by O'Brien. Blockbuster had been an account of hers for years, even prior to the time that O'Brien began her employment with Lucas. When Dowd resigned to go to work for Blockbuster, O'Brien advised Art Lucas of

that event. Art Lucas is the person who instructed O'Brien to bill Blockbuster for the Chris Dowd placement. The responsive e-mail from Chris Dowd submitted to allegedly justify Lucas' decision to terminate, no doubt is based on Dowd's ignorance of Art Lucas having instructed O'Brien to send the invoice.

Chaponick had hired Cohen and Cohen reported to Chaponick. For some reason, Chaponick had indicated that he would like to move his desk away from Cohen's. Around the same period of time, O'Brien received information from the information technology section of Lucas that Mr. Cohen was spending an inordinate amount of time on the Internet gambling, surfing the web, and viewing pornography. Once O'Brien learned this, she did move Mr. Cohen to an area closer to her "office". When O'Brien moved Cohen to that area, he became infuriated and quit. He became so infuriated that he started throwing things at O'Brien.

Two of the people that Lucas contends commented unfavorably about O'Brien's management which allegedly led to discharge were Jeanie Turner and Gary Thomas. Thomas complained that he was offended by a "stripper" who came to the office. The "stripper" was the personal trainer of Ron Cohen and Rick Lucas. The stripper was arranged by Ron Cohen, not O'Brien. In fact, and contrary to the hearsay claims, Thomas was laughing as O'Brien arrived, following the arrival of the trainer/stripper.

Jeanie Turner left Lucas voluntarily. It was later discovered that Turner had formed a corporation or an Executive Search Firm with Gary Thomas. Both of these individuals at the time were married to other people. It became apparent after Jeanie Turner left

that she had been engaged in an extramarital affair with Gary Thomas. It also became apparent that she was competing with the Lucas Group. Although it was known that she was competing with the Lucas Group and that Turner was perhaps coordinating these efforts with Gary Thomas while he was still employed at Lucas, nothing was done. Gary Thomas later voluntarily resigned and after he resigned, both Thomas and Turner were sued for violating a Non-Compete Agreement. Obviously, these individuals would not be happy knowing that their extramarital affair had been discovered and that they were being sued. The lawyers for Lucas copied O'Brien with their assessment of these two individuals and in their assessment they both mention that they both lacked credibility. That was communicated to O'Brien prior to her termination. For Lucas to suggest that these two individuals' complaints would give rise to any basis for O'Brien's discharge is mendacious at best. Art Lucas was the person who wanted to sue the people to show them what happens when a person leaves and tries to continue in the industry.

Albert Johnson was an older gentleman who Art Lucas told O'Brien to fire. Albert Johnson was a very methodical recruiter and was in his late 40's. Art Lucas told O'Brien at the time he advised her to terminate Mr. Johnson that she was not to hire anymore "old farts" like Johnson.

Diane Schmidt was developing as a good recruiter. Art Lucas told O'Brien to fire Schmidt because unfortunately Schmidt was afflicted with some acne scarring and Mr. Lucas maintained that she did not fit the "babe" image needed at Lucas. Art Lucas made O'Brien cut Schmidt's draw to $250.00 per week so she would quit and not collect unemployment.

O'Brien did not fire Schmidt.

Kim Wimmer likewise was very complimentary of O'Brien's management style and had sent O'Brien an e-mail to that effect. As O'Brien stated, Wimmer was terminated for posting confidential search information on the Internet. It is a company policy that when a company is in search of a candidate and they request the search be kept confidential is generally because the person who is going to be hired is a replacement for someone still employed. Collectively, Human Resources, deMartino and Lucas advised O'Brien to terminate Wimmer.

Also provided to the courts below was the lone performance appraisal O'Brien still possessed. Lucas claimed there were none. This performance appraisal was dated October, 2000 and it was the first time the issue of turnover was ever mentioned. That occurred in October, 2000 and not May of 2000 as suggested by Lucas. When O'Brien heard of this, she began to assimilate information from her employees as previously mentioned in the "Manager Feedback" on suggestion from Benningfield. In the performance appraisal, deMartino noted that O'Brien lead the number one search branch in profits and that deMartino was very proud of O'Brien's work. Among the items that deMartino indicated O'Brien needed to perform, were adding and developing quality accounts, continuing office ambiance improvement (noting that it was improving) building on the strengths that were currently possessed, controlling the rising costs or offerings with increased sales. As noted on the second page of the appraisal, deMartino indicated that help would be coming from the corporate recruiting to help staff and upgrade the office because O'Brien's responsibilities were so high and intense that the

recruiting of staff was going to be transferred to the corporate office and would not be O'Brien's responsibility. That is to say that the suggestion that turnovers were O'Brien's issue was far from the truth. As previously mentioned, O'Brien's male counterparts experienced turnover that far exceeded O'Brien's.

Then, in November of 2000, O'Brien complained that Mike Devereaux was using surly language on her voicemail. This was after O'Brien mentioned to deMartino that the women in the office were feeling very uncomfortable with the boorish behavior of the male counterparts. In response to O'Brien's e-mail deMartino advised that she would "give him a slap."

O'Brien was also told by Art Lucas that researchers were going to be eliminated and many of the individuals who were reduced from the force were reduced expressly at the instruction of Lucas. Moreover, Art Lucas was very complimentary of O'Brien's team in September 2000 which directly contradicts the claims made in the Motion for Summary Judgment.

In February, 2001, O'Brien received a card from deMartino stating that O'Brien had survived four years with the "wild" Lucas Group. Not one negative word was ever mentioned about those alleged issues of turnover after the performance appraisal which stated recruiting would be performed by Corporate Headquarters.

More Men Can Do No Wrong

Lucas was anything but a professional non-discriminatory environment. The men were commonly drunk after corporate meetings and O'Brien was criticized because of her unwillingness to engage in drunken behavior. In the eyes of Lucas, men could commit serious, obscene and lurid infractions with no

repercussion. The men were seen urinating in public and baring there derrieres to women at corporate meetings. At times the men were involved in brawls at the local bars in upscale Atlanta, Georgia. Some recruiters were arrested for DUI and spent the night in jail. As mentioned earlier, Devereaux and Tommarello were two of O'Brien's peers who received no corrective action for clearly more serious allegations that were founded rather than the unfounded allegations that were made against O'Brien.

The Termination

On May 15, 2001, O'Brien was called to a restaurant with deMartino. Of course, O'Brien had recently been vocal about the way women were treated. O'Brien made complaints that she was paid less than her male counterparts and that she did not receive any consideration of the caliber that the male counterparts did that were not producing as much as O'Brien. Specifically, O'Brien learned that Mr. Chaponick, who was fraudulently billing General Motors, was receiving $13,000.00 per month in draw. O'Brien's draw was $2083.00 and she had to cover many times her own expenses for months on end. In this termination meeting, Cathy deMartino stated: "you know I love you but this is Art's decision. O'Brien was provided an Employment Termination Agreement. The agreement provided that on the 15th day of May O'Brien would be terminated and as a consideration for the termination, she would be paid four weeks of severance. When Lucas was advised that O'Brien was going to consult with an attorney and that she was outraged because Devereaux and Tommarello and every other male received better treatment that she did, then and only then a recruiter's position was offered.

Lucas' claim that O'Brien was not discharged but

was only demoted was a question of credibility on a core material issue, which the trial court minimized in a footnote and which did not cause the trial court to question the credibility of Lucas' Affiants. (App 25a) The Fifth Circuit skirted the credibility problem by concluding O'Brien was fired. (App 3a)

What O'Brien was able to ascertain when she returned on the 18th to retrieve her items was that O'Brien was replaced by Jeff Chaponick. O'Brien had requested permission to fire Chaponick in the latter part of April, 2001. Art Lucas refused to authorize the termination. O'Brien made a copy of Chaponick's notes for his department meeting where he was going to be instructing the employees on his new management position. Chaponick also advised O'Brien verbally that he was taking O'Brien's position. It is clear from the Memo that Chaponick and not some female was assuming O'Brien's position. Chaponick defrauded General Motors and got O'Brien's job. He (Chaponick) clearly was treated more favorably by Lucas and deMartino.

To respond to the summary judgment motion, O'Brien also reviewed the alleged exit interviews. She noted that many are in the same handwriting. She also noted they are not authenticated by anyone and many, if not all, are written in the third person although they were to be completed by the Associate personally. O'Brien objected to the documents as hearsay. The trial court overruled the objection finding a hearsay exception or the documents weren't offered to prove the truth of the matter asserted. (App 29a) The interviews were hearsay and if not offered to prove the matter asserted, then the exhibits were not material or relevant.

The Lucas policy regarding exit interviews

demonstrated the "Exit Interviews" were a sham. The policy states the interviews are not practical or wise to be done on terminated employees. The policy among other things specifically provided the interviews should be done before the last day, not done on people who were discharged and the forms on their face state they are to be completed by the Associate. The forms were completed in third person and are clearly hearsay. None of these facts were stated as such by the Fifth Circuit but were referred to as subjective beliefs, conclusory statements or lacking evidentiary support and were rejected as allegedly inconsistent with the record evidence. The Fifth Circuit concluded O'Brien's claims were lacking merit in general and/or were vacuous and therefore remanded for an assessment as to why there were no fees awarded Lucas, even though Lucas never submitted a cost bill or other evidence of what was alleged as the attorney fees incurred.

TCHR[1]

---

1 The TCHR is the equivalent of the Title VII inasmuch as Texas is a deferral state and as such receiving federal subsidy as a deferral state. The preamble to the Human Rights Act specifically states:

§ 21.0001. Purposes

The general purposes of this chapter are to:

(1) provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments (42 U.S.C. Section 2000e *et seq.*)

(2) identify and create an authority that meets the criteria under 42 U.S.C. Section 2000e-5(c) and 29 U.S.C. Section 633;

§ 21.051 Discrimination by Employer

An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer:

(1) fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an

It is undisputed that O'Brien is female. (And was thus a member of the protected class and adversely affected by Lucas' decision).

The evidence also established that O'Brien was clearly qualified to perform the position because she had performed admirably by all accounts. O'Brien was replaced by a male even by the Fifth Circuit's conclusion. According to the Fifth Circuit, an employer can escape a *prima facie* case if the non protected replacement is later switched with a protected replacement! How quickly that must be done is not explained by the Circuit.

The Fifth Circuit and the trial court considered the evidence in the light most favorable to Lucas and explained away all of the inconsistencies or failed to mention them in the opinions. None of the courts below or Lucas ever explained the clear inconsistent statement by Lucas that O'Brien quit even though Lucas' version was belied by a termination letter Lucas authored. Also, the evidence established that the stated reason for O'Brien's termination was false and pretext as well as evidence males were treated more favorably by Lucas when work place discipline was meted out.

ARGUMENT: REASONS FOR ALLOWANCE OF THE WRIT

1. The Fifth Circuit's opinion so confounds the burdens in a summary judgment

---

individual in connection with compensation or the terms, conditions, or privileges of employment; and; or

(2) limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee.

setting involving alleged employment discrimination that the significance of *stare decisis* vanishes. The opinion ignores this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) regarding the quantum of proof required in an employment discrimination case. The opinion further contorts Fed. R. Civ. P. 56 to the point that all of the evidence is considered in the light most favorable to the movant and credibility questions are unilaterally attributed to explanations not sponsored by the movant without considering the possibility that it was mendacity or was probative of the suspicion of mendacity. The trial court and Fifth Circuit also failed to consider direct evidence in the 69 page summary judgment appendix that would refute summary judgment, concluding all the evidence was conclusory, subjective belief trivial or was unsubstantiated even though not controverted. Such deviation from the accepted and usual course of proceedings under Fed. R. Civ. P. 56 and the rules of law mandated by this Court, as well as Fifth Circuit precedent, leaves uncertain the role of the trial court, the viability of *Reeves*, the burden of the non-movant in a summary judgment proceeding in an employment discrimination case and a litigant's ability to properly evaluate the unlawful conduct of the employer; therefore, review by this

Court is warranted.

The Fifth Circuit's opinion in *O'Brien* is in direct contrast to this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). The *O'Brien* opinion further conflicts with Fifth Circuit precedent, as well as decisions from other circuit courts, including the First, Third, Fourth, Ninth and Tenth Circuits, which follow *Reeves* on the quantum of proof required in a summary judgment proceeding involving an employment discrimination case. *See e.g., Russell v. McKinney Hospital Venture*, 235 F.3d 219, 223(5th Cir. 2000); *Evans v. City of Bishop*, 238 F.3d 586, 590 (5th Cir. 2000); *Blow v. City of San Antonio*, 236 F.3d 293, 298 (5th Cir. 2001); *Ratliff v. City of Gainesville, Texas*, 256 F.3d 355 (5th Cir. 2001); *Fierros v. Texas Department of Health*, 274 F.3d 187 (5th Cir. 2001); *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (10th Cir. 2000); *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115 (9th Cir. 2000); *Murrell v. Ocean Mecca Motel, Inc.*, 262 F.3d 253 (4th Cir. 2001); *Rivera-Rodriguez v. Frito Lay Snacks Caribbean*, 265 F.3d 15 (1st Cir. 2001); and *Abramson v. William Patterson College of New Jersey*, 260 F.3d 265 (3rd Cir. 2001).

As followed by other circuit's, and as this Court held in *Reeves*, "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves* at 530 U.S. at 148, 120 S.Ct. at 2109. This Court previously reasoned that "the fact-finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by suspicion of mendacity), together with the elements of the *prima facie* case, may suffice to show intentional

discrimination." *Reeves*, 530 U.S. at 147, 120 S.Ct. at 2108, *citing St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 517, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). Further, "rejection of the Defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . [and] '[n]o additional proof of discrimination is *required*." (emphasis in original) *St. Mary's*, 509 U.S. at 511, 113 S.Ct. at 2747-50; *see also Reeves*, 530 U.S. at 147, 120 S.Ct. at 2108. This Court made it clear that proof of the falsity of the employer's stated reason for the adverse employment action is a form of circumstantial evidence that is probative of intentional discrimination. *Reeves*, 530 U.S. at 147; 120 S.Ct. at 2108, *citing St. Mary's*, 509 U.S. at 517, 113 S.Ct. 2742.

In reiterating the *St. Mary* standard, this Court in *Reeves* recognized that there may be some instances where no rational fact-finder could conclude that discrimination occurred even when a *prima facie* case has been established and there is sufficient evidence to reject the stated explanation. *Reeves*, 530 U.S. at 148, 120 S.Ct. at 2109. For instance: (1) if the record revealed as a matter of law some nondiscriminatory reason for the decision; or (2) if the employee created only a weak issue of fact as to the falsity of the employer's explanation and there was "abundant and uncontroverted **independent** evidence" that no discrimination occurred. *Id.* (Emphasis added)

Such inadequacies were not present in *O'Brien*. Nonetheless, in contrast to clear precedent, the Fifth Circuit affirmed summary judgment, rejecting O'Brien's sex discrimination/retaliation claims in favor of the employer's story, ignoring O'Brien's evidence of the falsity of the stated reason for termination and resolving the obvious credibility questions in favor of

the movant-employer. The trial court and Fifth Circuit also departed from *Reeves* by giving credence to the testimony offered by Lucas from interested witnesses that was contradictory and impeached contrary to *Reeves* requirement to the contrary. *Id at* 2110.

O'Brien stated in her Declaration that the stated reason for the termination was sex discrimination. As O'Brien explained in her Declaration, it was only after she complained of boorish male behavior that her work was criticized. Lucas claimed there was progressive discipline initiated before "O'Brien quit." A jury could have easily inferred that it never happened when compared to the October performance appraisal and is a pretext reason for the termination and turnover rate only asserted as a recent fabrication

If that were not enough, Lucas's testimony conflicted about most every stage of the termination process, including the stated reason. The evidence of the falsity of the stated reason and Lucas's lack of credibility clearly should have precluded summary judgment. Instead, the Fifth Circuit resolved the credibility issues in favor of Lucas, somehow finding it appropriate to conclude that the inconsistencies were either unsupported by the record, subjective beliefs or *so vacuous* as to be immaterial. O'Brien would suggest the 69 page appendix which was offered in evidence and not fairly described by either court below was anything but trivial. There were numerous inconsistencies between all of the interested witnesses. Some of Lucas's credibility problems regarding material issues in this case included:

√ Side by side, there are sharply different accounts of what transpired. Lucas claimed O'Brien quit and just did not understand why she quit. That was belied by the termination letter.

√ In addition to the fact that O'Brien was fired rather than quit, deMartino stated it was not her decision but rather Art Lucas. Initially the reason was poor performance.

√ The exit interviews were not completed per company policy.

√ deMartino told O'Brien she was replaced by Chaponick. Later deMartino states in her affidavit she assumed the role rather than Chaponick.

√ The "exit interviews" were clearly completed after the fact and deMartino maintained O'Brien was offered a job anywhere Lucas held offices. That statement melts into mendacity when compared to the termination letter.

√ No doubt O'Brien was treated differently than Chaponick. Chaponick steals and is promoted. O'Brien wants to fire Chaponick for it and then O'Brien gets fired.

The above examples constitute powerful evidence that the stated reason for termination was false and discriminatory because Lucas's representatives exhibited a complete lack of veracity on the issues most material to this case, i.e., was O'Brien fired or did she quit while contemplating the same job with just a few less responsibilities as Lucas alleged, no to mention, why O'Brien was allegedly terminated, how and who made the decision. Granting summary judgment was wrong in this case in light of *Reeves* and its progeny.

Summary judgment should never have been granted in such a case. That it was, leaves in serious doubt the adherence to *Reeves* in the Fifth Circuit, the role of the trial courts in evaluating evidence of credibility and the sufficiency of the evidence required to defeat summary judgment in an employment

discrimination case.

Upon review of the summary judgment evidence, this case involved a credibility question between O'Brien and Lucas, and required a sorting of the inconsistencies between each of Lucas's representatives. The outcome of each claim should have depended on which witnesses the jury believed, as opposed to the court. The error of the Fifth Circuit's effort at credibility assessment is only further confirmed by a review of the Civil Pattern Jury Instructions which state in relevant part:

> 1. [Y]ou the jury are the judges of facts.
>
> 2. In determining the weight to give the testimony of a witness, you should ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact, or whether there was evidence that at some other time, the witness said or did something, or failed to say or do something, that was different from the testimony the witness gave before you during the trial.
>
> 3. [I]f a witness has made a misstatement, you need to consider whether that misstatement was an intentional falsehood *or* simply an innocent lapse of memory; and the significance of that may depend on whether it has to do with an ***important* fact** or with only an unimportant detail.
>
> 4. The testimony of a single witness may be sufficient to prove any fact, even if a greater number of witnesses may have testified to the contrary, if after considering all the other evidence, ***you believe that single witness***.

(Emphasis added) *See* Pattern Jury Instructions, Fifth

Circuit (Civil Cases), Section 3.1 (West 2001).

Had the Fifth Circuit abided by *Reeves*, the issue of whether O'Brien suffered discrimination would have been properly left for the jury to resolve. Instead, after resolving the disputed fact issues in favor of Lucas and rejecting O'Brien's affidavit testimony *as subjective and wholly conclusory beliefs*, the Fifth Circuit in affirming summary judgment, eviscerated *Reeves* and crafted a new and heightened summary judgment burden for non-movant-employees in a discrimination case.

The *O'Brien* standard directly conflicts with *Reeves*. A reading of *O'Brien* demonstrates the denigration of *Reeves* and obscures what is the sufficiency of proof required by an employee-non-movant to survive a Rule 56 summary judgment motion. In short, the fundamental purpose of *stare decisis* serves to define the parameters of when one can expect to survive summary disposition when they cannot. Under *O'Brien*, the concept has evolved into a moving target.

2. The Fifth Circuit has issued an opinion which improperly applies the Court's opinion in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000). to state the Circuit Court will not delineate the evidence offered by the non-movant and will not explain what is in the record and will not state why the evidence is trivial or not material. The courts below merely concluded the evidence was not present or essentially carried no weight. This departure from accepted and usual course of proceedings using Fed. R. Civ. P. 56 warrants review by this Court.

In addition to chiseling away at the essence of *Reeves*, the *O'Brien* opinion machinates the Court's opinion in *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

In *Celotex*, this Court explained that a non-movant in a summary judgment proceeding, who bears the burden of proof on the issues in question, may not rely on unsupported claims or defenses in the pleadings, but in responding to a motion for summary judgment is required "to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file', designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex* 477 U.S. at 323-324, 106 S.Ct. at 2553, *quoting* Fed. R. Civ. P. 56(e).

As such, in an employment discrimination case, the affidavit testimony of the non-movant-employee which sets forth specific facts showing a genuine issue for trial suffices to defeat summary judgment, particularly an affidavit such as O'Brien's which specified that, O'Brien was fired rather than quit as Lucas alleged; *see also Vance v. Union Planters Corp.*, 209 F.3d 438, 442 & n.3(5th Cir. 2000)(even if evidence consists solely of plaintiff's testimony, discrimination may be established); *Fierros v. Texas Department of Health*, 274 F.3d 187 (5th Cir. 2001)(2001 WL 1484868 at *6)(affidavit testimony regarding discriminatory statements made by the employer alone precludes summary judgment and constitutes direct evidence, not merely a "subjective belief").

In contrast, the Fifth Circuit in *O'Brien* cited *Reeves* for the notion that "unsubstantiated assertions are not competent summary judgment evidence" and from there saw fit to reject O'Brien's evidence of mendacity and her evidence of

retaliation/discrimination. In other words, the Fifth Circuit diluted the well-settled holding of *Reeves* that the court should review all the evidence in the record. Here the 5th Circuit did not describe any of O'Brien's evidence or why it was not material or why it was considered *conclusory*.

The fact finders as stated by this Court in *St. Mary's Honor Center v. Hicks*, as well as *Reeves v. Sanderson Plumbing Products, Inc.*, are to determine the very issues unfortunately decided by the trial court and the Fifth Circuit court in this case. Moreover, the trial court made inferences from the evidence which were not the only inferences that could be logically drawn from the facts proven. The Fifth Circuit went on to conclude that O'Brien's evidence of disparate treatment or more harsh discipline for her than males was without merit because it did not occur under nearly identical circumstances. O'Brien had demonstrated that her male counterparts had committed worse or similar transgressions (theft) and nevertheless received a promotion, but were not fired and later claimed to have quit.

As this Court noted in *McDonald v. Santa Fe Trail Transp.Co.*, 427 U.S. 273 (1976) precise equivalence of the allegations of misconduct are not required. The issue is comparable severity. Nevertheless, the Fifth Circuit maintained that nearly identical circumstances must exist when comparing the discipline applied to O'Brien and not applied to her male replacement or other male counter-parts. It could clearly be concluded as noted by the Sixth Circuit that nearly identical circumstances will rarely exist. *Ercegovitch v. Goodyear Tire & Rubber, Co.*, 154 F.3d 344 (6th Cir 1998) If the non-protected employee to whom the Plaintiff compares himself or herself must be

identically situated to the Plaintiff in every single aspect of their employment, a plaintiff whose job responsibilities are unique to his or her position will *never* successfully establish a *prima facie* case (absent direct evidence of discrimination). 54 F.3d at 353. Rather as this Court noted, the concept of comparator's must be a fluid one that is adapted to the particular context in which the evidence is assessed. *Ornelas v. United States*, 116 S.Ct. 657 (1996) ("reasonable suspicion and probable cause are fluid concepts that take their substantive content from the particular events in which the standards are being assessed.") In this case, and many others, following *McDonald v. Santa Fe Trail Transportation* the Fifth Circuit has required near identical circumstances to use comparator's evidence as proof of discrimination.

Although deMartino claimed she and Art Lucas made the decision, it was Lucas , according to deMartino as told to O'Brien, who made the decision. With Lucas's witnesses having such difficulty with the practice and methodology that led to O'Brien's discharge one could clearly infer that none of them were forthright regarding the process and that it was all a ruse to conceal sex discrimination.

O'Brien would suggest that when all of the actors vary with their descriptions considerably over the issues, that is another form of circumstantial evidence which would give rise to the inference of discrimination following the establishment of a *prima facie* case. There is no doubt that O'Brien was a member of a protected class, was qualified for the position, that she suffered adverse employment action and that she was terminated.

In sum, all of the evidence that was offered by O'Brien was considered in a light most favorable to the

movant. All inferences to be drawn from the evidence were drawn in favor of the movant. The evidence that O'Brien offered was not considered, not mentioned or explained away. The Fifth Circuit claimed that O'Brien's evidence was subjective belief, without a shred of evidentiary support or conclusory allegations and speculation. The circuit court also contended that O'Brien's allegations of discrepancies in Lucas's summary judgment evidence were either unsupported by the record or so trivial as to be immaterial. The circuit court provided no explanation as to how it reached that conclusion notwithstanding the existence of O'Brien's Declaration, a prima facie case, the numerous inconsistencies found in the evidence when the accounts are compared. To confound the matter the Fifth Circuit reverses and remands for attorney fee because the trial court did not give written reasons for denying a request for fee that was not offered into evidence. This is error. See Christianburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S.412 (1978)

CONCLUSION

The *O'Brien* opinion exemplifies the need for guidance for courts to follow in determining which claims are appropriate for summary judgment in an employment discrimination case. Further, the opinion deviates from this Court's decision in *Reeves*, and leaves uncertain the role of the trial courts in evaluating evidence and making credibility assessments. Left in obscurity is the amount of proof required by the non-movant-employee to defeat summary judgment and the question of whether *Reeves* requires a review of the entire record from the non-movant in the most favorable light, drawing all reasonable inferences in favor of the non-moving party,

but making no credibility determinations or weighing any evidence. *Id.*

To provide some vitality to the concept of *stare decisis*, some level of predictability to employee/employer rights, review by this Court is warranted.

Respectfully submitted,

JOHN E. WALL, JR.
Counsel of Record
LAW OFFICES OF
JOHN E. WALL, JR.
5728 Prospect Avenue
Suite 2001
Dallas, Texas 75206
(214) 887-0100 *telephone*
(214) 887-0173 *facsimile*
Attorneys for Petitioner

(Any footnotes trail end of each document)

No. 04-10738

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARY O'BRIEN,
Plaintiff-Appellant-Cross-Appellee,

v.

LUCAS ASSOCIATES PERSONNEL, INC.,
doing business as LUCAS GROUP;
LUCAS ASSOCIATES, INC.,
Defendants-Appellees-Cross-Appellants.

April 5, 2005, Filed

COUNSEL: MARY O'BREIN, Plaintiff - Appellant - Cross - Appellee: John Edward Wall, Jr, Law Offices of John E Wall Jr, Dallas, TX.

For LUCAS ASSOCIATES PERSONNEL, INC dba Lucas Group;LUCAS ASSOCIATES, INC Defendants - Appellees - Cross - Appellants: Stephen E Fox, Jason Michael Ross, Fish & Richardson, Dallas, TX.

JUDGES: Before JONES, BARKSDALE, and PRADO, Circuit Judges.

OPINION: PER CURIAM: *

Appellant challenges the grant of summary judgment against her sex discrimination claims, while the

employer cross- appeals the denial of attorneys' fees requested pursuant to Texas law. We AFFIRM the district court's judgment on the merits but REVERSE and REMAND for further consideration of the attorneys' fees request.

Background

Lucas Associates Personnel, Inc., d/b/a Lucas Group Lucas Associates, Inc. ("Lucas") is a privately held recruitment firm, divided into military, legal and executive search groups. In February of 1997 Cathy de Martino, vice-president of the executive search group, and Art Lucas, company president, hired Mary O'Brien as a managing partner of the executive search group and as a recruiter in the Dallas office. See R. at APP000004 (de Martino Aff.). As a managing partner, O'Brien's primary charge was leading and building the Dallas executive search group. Id. As a recruiter, she was responsible for selling Lucas's executive recruiting services. Id. Between 1997 and 1999, O'Brien hired twenty-one people. However, the turnover rate of her hires was ninety percent; a total of nineteen employees, male and female, either resigned or were terminated during her tenure. Id.; see also R. at APP0000010 (Roush Aff.). Pursuant to company policy, every exiting employee completed an exit interview form. Many criticized O'Brien's management style and remarked that she was a difficult person for whom to work. Those who continued in the employ of Lucas also registered complaints about O'Brien's management style. See R. at APP0000010 - 11 (Roush Aff.).

In reaction to her turnover rate and employee complaints, de Martino counseled O'Brien on her

leadership and management style. See R. at APP000004 (de Martino Aff.). In May of 2000, in response to continued problems, de Martino used part of the division's budget to hire a professional "executive coach" to help O'Brien improve her management skills. Id. at APP000005 (de Martino Aff.); see also R. at APP0000011 (Roush Aff.). de Martino also instituted a "corrective action plan," that required O'Brien to, inter alia, develop clear and consistent employee expectations, focus on building team spirit with regular meetings, sales contests, group outings and training, and work on her office etiquette (e.g., O'Brien was prohibited from gossiping and sending negative e-mails to employees). See R. at APP000005 (de Martino Aff.).

One year later, complaints about O'Brien persisted. Several more employees resigned, many citing O'Brien as the reason for their departure. Id. Many of the continuing employees characterized O'Brien as "hostile," a "gossip," "mean," "misleading," and a "playground bully." de Martino and Lucas decided to terminate O'Brien as a managing partner in May of 2001, but allowed her to retain her recruiter position. Id. at APP000006. de Martino assumed O'Brien's managerial role until she left the company and was succeeded by Andrea Jennings. Id. After O'Brien's demotion, Lucas similarly demoted four other managing partners, all men, to exclusive recruiter positions.

O'Brien filed a complaint with the Texas EEOC on November 15, 2001, charging gender discrimination related to her discharge as a managing partner in May of 2001. O'Brien sub- sequently filed a civil action under the Texas Commission on Human Rights Act, § 21.051

of the Texas Labor Code. R. at USCA5 28. Lucas removed the case to federal court. R. at USCA5 11. The district court entered summary judgment in favor of Lucas and dismissed O'Brien's claims. Specifically, the district court found that O'Brien failed to establish a prima facie case of gender discrimination and failed to exhaust state remedies in relation to her hostile work environment claim. O'Brien appeals from this judgment. n1 The district court also denied, without explanation, Lucas's request for attorneys' fees and costs pursuant to Texas Labor Code § 21.259(a). Lucas cross-appeals from the district court's denial of fees and costs.

On appeal, O'Brien argues that the high turnover rate in her division was commensurate with the industry-wide turnover rate in her field. She further contends that she was dissimilarly treated from her male counterparts, who also had high turnover rates. O'Brien also claims that male managing partners were physically and verbally abusive to staff, often used "lewd" and "profane" language, and told sex stories and sexist jokes without consequence. O'Brien characterizes the work environment at Lucas as sexually harassing, and attributes some of the turnover in her division to that atmosphere. O'Brien maintains that de Martino rebuffed her attempts to address the work environment. O'Brien also alleges that she was sexually harassed by Lucas, contending that he would frequently ask about her age, marital status, and romantic life. She also maintains that Lucas had a "top ten babes list" in the Atlanta Office. O'Brien also contends that she was disparately denied leave to care for her sick mother, while male counterparts were permitted unrestricted amounts of leave for frivolous

activities, such as golf outings. O'Brien argues that, despite the harassing atmosphere, she was always a top performer. As to the negative employee comments, O'Brien questions the authenticity of the some of the exit interview documents and characterizes them as a "sham."

Standard of Review

This court reviews a district court's grant of summary judgment de novo, applying the same standards as that court. Norman v. Apache Corp., 19 F.3d 1017, 1021 (5th Cir. 1994).

Discussion

Pursuant to the burden-shifting framework operative in Title VII disparate treatment cases that turn on circumstantial evidence, n2 O'Brien must demonstrate a prima facie case of sex discrimination. If she does so, the burden shifts to Lucas to articulate a legitimate, non-discriminatory basis for its employment decision. If Lucas meets this burden, to prevail on her Title VII claim, O'Brien must demonstrate that Lucas's articulated reason is a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-04, 93 S. Ct. at 1824-25.

Although the prima facie burden is extremely low and usually met with minimal effort, O'Brien has failed to meet the burden here. To demonstrate a prima facie case of sex discrimination, O'Brien must show that she: (1) belongs to a protected group; (2) was qualified for the position sought; (3) suffered adverse employment action; and (4) was replaced by someone outside of her

protected class. See Manning v. Chevron Chem. Co., LLC., 332 F.3d 874, 881 (5th Cir. 2003) (citing Price v. Fed. Express Corp., 283 F.3d 715, 720 (5th Cir. 2002)). While there is no serious dispute as to O'Brien's ability to demonstrate the first three prongs of the prima facie test, she is unable to make the fourth showing - that she was replaced by someone outside of her protected class. Much to the contrary, the record evidence demonstrates that O'Brien was replaced by two other women, Cathy de Martino and Andrea Jennings. O'Brien's assertion that she may have been replaced by a man, Jeff Chaponick, is belied by the record evidence, which demonstrates that she was, indeed, replaced by two women. n3 O'Brien's affidavit to the contrary fails to controvert the record evidence because, as even she admits, her assertion is not based on personal knowledge. n4 See Fed. R. Civ. P. 56(e) (requiring that "opposing affidavits shall be made on personal knowledge"); Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77, 80 (5th Cir. 1987) (holding that factual assertions not based on personal knowledge do not qualify as competent summary judgment evidence capable of controverting properly supported facts). Thus, O'Brien fails to create a fact issue on this point.

However, because the prima facie burden favors the complainant, O'Brien's inability to meet the fourth prong does not end our inquiry. See Williams v. Trader Publ. Co., 218 F.3d 481, 485 (5th Cir. 2000) (noting that although replacement by a person outside of the plaintiff's protected class is evidence of discriminatory intent, it is not essential to present a prima facie case) (citing Hornsby v. Conoco, Inc., 777 F.2d 243, 246 (5th Cir. 1985)). O'Brien may still meet her prima facie burden by demonstrating that the adverse employment

action was motivated by her gender. "To establish a prima facie case in this manner, [O'Brien] must show that [male] employees were treated differently under circumstances nearly identical to [hers]." Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1090 (5th Cir. 1995) (internal citation and marks omitted). To this end, O'Brien maintains, on appeal, that she and similarly situated male counterparts were dissimilarly treated to her detriment. However, O'Brien's argument fails for several reasons. First, her contentions on appeal are inconsistent and otherwise unsupported by her own deposition statements. In deposition, O'Brien averred that she was treated differently from both similarly situated male and female counterparts. This admission belies her claim that Lucas's decision to demote her was motivated by gender-based discriminatory animus.

Second, O'Brien has failed to demonstrate that she was treated differently from any of the male managing partners under circumstances nearly identical to hers. Although O'Brien cites similar turnover rates experienced under her and some of her male counterparts, she fails to present summary judgment evidence that any of her male counterparts had a similar, much less nearly identical, documented pattern of employee complaints against them. See e.g. Williams, 218 F.3d at 485 (noting that the plaintiff failed to demonstrate identity of circumstance as she was unable to show that her male counterparts had a pattern of disruptive behavior similar to hers); see also Nieto v. L&H Packing Co., 108 F.3d 621, 624, 623 (5th Cir. 1997) (finding that a Hispanic complainant was not similarly situated with his Anglo counterparts where the complainant had disregarded instructions not given to his Anglo counterparts and the complainant had a prior

disciplinary record, while his Anglo counterparts did not).

Third, O'Brien's attempt to make this showing is further frustrated by the anti-animus presumption that arises when the decisions to hire and fire an employee are made by the same person. The "same actor doctrine" reasons that "from the standpoint of the putative discriminator, it hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job." Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996) (internal marks omitted) (quoting Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991)). That presumption is especially operative here. Not only was O'Brien hired by de Martino (a woman) and Lucas, but those same actors demoted O'Brien only after a series of attempts, including one-on-one meetings and the hiring of a career coach, to help O'Brien avoid adverse employment action. These circumstances belie O'Brien's rather bare assertion of discriminatory intent by these actors. Moreover, O'Brien's "cat's paw" argument - that de Martino was not part of the demotion decision, but just the front person serving on behalf of Lucas, who was acting with discriminatory motive - is inconsistent with the record evidence and is entirely based upon O'Brien's subjective and wholly conclusory beliefs.

Assuming, arguendo, that O'Brien has met her prima facie burden, Lucas has also met its burden - one of production, not persuasion - to articulate a legitimate, nondiscriminatory reason for its employment decision: that O'Brien was demoted because of her ninety

percent turnover rate and excessive complaints from employees, despite extensive measures by Lucas to help her combat these problems. See Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 142, 120 S. Ct. 2097, 2106, 147 L. Ed. 2d 105 (2000) (stating that "this burden is one of production, not persuasion; it 'can involve no credibility assessment'") (internal citation omitted). Lucas supported this articulation with the production of summary judgment evidence, including affidavits and supporting documentation from former employees who attribute their departures or employment problems to O'Brien's management style. This production is more than sufficient to rebut any prima facie case O'Brien may be able to establish.

Finally, and fatally, O'Brien fails to establish pretext. To establish pretext, O'Brien must "present sufficient evidence to find that the employer's asserted justification is false." Crawford v. Formosa Plastics Corp., 234 F.3d 899, 903 (5th Cir. 2000). Neither a tenuous inference, see Crawford, 234 F.3d at 903, nor the plaintiff's subjective belief, see Ray v. Tandem Computers, Inc., 63 F.3d 429, 434 (5th Cir. 1995), is sufficient to establish pretext.

In furtherance of her pretext argument, O'Brien argues that because pretext is nearly impossible to demonstrate, this Court should evaluate her evidence in a "fluid" manner, akin to the "reasonable suspicion" and "probable cause" case-specific standards operative in criminal law. O'Brien's evidentiary request lacks legal support, and is an obvious attempt to obfuscate the fact that her evidence of pretext is non-existent.

O'Brien "cat's paw" argument, discussed supra, is

entirely based on her own subjective belief and is advanced without a shred of evidentiary support. Similarly lacking evidentiary support are O'Brien's assertions that male employees engaged in malfeasance, theft, and the like.

O'Brien's additional effort to demonstrate pretext by proffering forms wherein certain employees attest to her good managerial skills is unavailing because the issue, for purposes of pretext analysis, is not whether O'Brien was, in fact, a good managing partner. See Deines v. Texas Dep't of Protective and Regulatory Svcs., 164 F.3d 277, 281 (5th Cir. 1999) (stating that "whether the employer's decision was the correct one, or the fair one, or the best one is not a question within the [fact finder's] province to decide"). Rather, the issue is whether Lucas actually and reasonably believed that O'Brien's ninety percent turnover rate and inability to work well with employees warranted her demotion. Deines, 164 F.3d at 281. Because O'Brien has failed to present competent summary judgment evidence that Lucas's asserted justifications for her demotion are false, Lucas's decision to demote O'Brien is supported by the business judgment rule, and we will not further question the validity or correctness of that decision. See id.

As to O'Brien's hostile work environment claim, because this claim is beyond the scope of her EEOC claim, wherein O'Brien only alleged Title VII violation for the discharge/demotion that occurred on May 15, 2001, we affirm the district court's dismissal of the claim for failure to exhaust state administrative remedies. See Thomas v. Tex. Dep't of Criminal Justice, 220 F.3d 389, 395 (5th Cir. 2000). Even if exhausted,

O'Brien's claim, embodied in all of one paragraph, is devoid of evidentiary support and does not even approach the requisite showing for such a claim. See Frank v. Xerox Corp., 347 F.3d 130, 138 (5th Cir. 2003) (explaining that a complainant must demonstrate, inter alia, that she subjectively perceived sexual harassment at her work environment as severe or pervasive, that her perception is objectively reasonable, and that the harassment affected a term, condition or privilege of her employment).

Finally, we address Lucas's cross-appeal for attorneys' fees and costs. Reviewing the district court's denial for abuse of discretion, see Pope v. MCI Telecomms. Corp., 937 F.2d 258, 266-67 (5th Cir. 1991), we reverse the district court's judgment and remand for an assessment of attorneys' fees and costs. Although the abuse of discretion standard effectively provides for deferential review, deference, while it may still be accorded, is not due where, as here, the district court has failed to provide written reasons for its determination. Moreover, given the degree to which O'Brien's claim lacks merit in general, and the vacuousness of some of her claims in specific, we find that the district court abused its discretion in failing to permit remuneration for Lucas's labor in defending itself against a suit such as the instant. See Pope v. MCI Communications Corp., 937 F.2d 258, 267-68 (5th Cir. 1991).

For these reasons, we AFFIRM the district court's summary judgment grant in favor of Lucas, REVERSE the district court's denial of attorneys' fees and costs to Lucas, and REMAND for an assessment of costs pursuant to Tex. Lab. Code § 21.259(a).

Footnotes

* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

n1 In O'Brien's statement of jurisdiction as elsewhere in her brief, she characterizes her action as one for sex discrimination and retaliation. As alleged by Lucas, and confirmed upon review of the record, neither O'Brien's EEOC filing nor her civil action asserted a retaliation claim. Thus, we do not accept this claim as part of her appeal.

n2 See Manning v. Chevron Chem. Co., LLC., 332 F.3d 874, 881 (5th Cir. 2003) (stating that when a plaintiff attempts to prove race or gender discrimination using circumstantial evidence, the court applies the burdenshifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 1824-25, 36 L. Ed. 2d 668 (1973)).

n3 In her own affidavit, O'Brien admits that any assumption of her duties by Chaponick were merely a temporary salve until Lucas found a permanent replacement. R. at USCA5 281.

n4 The district court, in fact, found that her affidavit was not competent for this very reason, and excluded it. Although O'Brien takes issue with this and other evidentiary rulings of the district court, she fails to identify specific rulings on appeal, and, thus, waives these issues. United States v. Avants, 367 F.3d 433, 442 (5th Cir. 2004). Nevertheless, O'Brien's amorphous

claims of evidentiary error appear to be without merit. The district court, it seems, properly excluded some of O'Brien's proffered summary judgment evidence for lack of personal knowledge and as impermissible hearsay, pursuant to RULE 56 of the FEDERAL RULES OF CIVIL PROCEDURE and various FEDERAL RULES OF EVIDENCE.

Civil No. 3:02-CV-2572-H

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

MARY O'BRIEN,
Plaintiff,

v.

LUCAS ASSOCIATES PERSONNEL, INC.
d/b/a LUCAS GROUP, and
LUCAS ASSOCIATES, INC.,
Defendants.

May 18, 2004, Decided
May 18, 2004, Filed

COUNSEL: Mary O'Brien, Plaintiff, Pro se, Dallas, TX.

For Mary O'Brien, Plaintiff: John E Wall, Jr, Law Office of John E Wall Jr, Dallas, TX.

For Lucas Associates Personnel Inc dba Lucas Group, Lucas Associates Inc, Defendants: Kelly Jean Beard, Law Office of Kelly Jean Beard, Marietta, GA. Stephen E Fox, Fish & Richardson, Dallas, TX. Gregory A Bailey, Meadows Ichter & Bowers, Atlanta, GA. Jason M Ross, Fish & Richardson, Dallas, TX.

Ross W Stoddard, III, Provider, Pro se, Irving, TX.

JUDGES: BAREFOOT SANDERS, SENIOR JUDGE, UNITED STATES DISTRICT JUDGE.

OPINION BY: BAREFOOT SANDERS

OPINION:

MEMORANDUM OPINION AND ORDER

Before the Court is Defendants' Motion for Summary Judgment, filed March 15, 2004, and the response and the reply thereto. Also before the Court are Plaintiff's Objections to Defendants' Summary Judgment Evidence, filed April 6, 2004; Defendants' Objections and Motion to Strike Plaintiff's Summary Judgment Evidence, filed April 19, 2004; and the responses thereto. For the following reasons, Defendants' motion for summary judgment is GRANTED.

I. Background

In her First Amended Complaint, Plaintiff Mary O'Brien ("O'Brien") alleges that Defendants Lucas Associates Personnel, Inc., d/b/a Lucas Group, and Lucas Associates, Inc. (collectively "Lucas"), violated the Texas Commission on Human Rights Act ("TCHRA") when Lucas discharged O'Brien on May 15, 2001, due to her gender. (P.'s Am. Compl. at 6-8.) O'Brien also alleges a claim for hostile work environment. (Id. at 4-5; P.'s Resp. at 17.)

Lucas is a recruitment firm based in Atlanta, Georgia. In February 1997, Cathy de Martino ("de Martino") and Art Lucas ("Mr. Lucas") hired O'Brien as a recruiter and managing partner of Lucas's Executive Search Group in Dallas, Texas. By most accounts, O'Brien

excelled in the recruiting aspect of her position. However, according to Lucas, O'Brien did not enjoy similar success in the management aspect of her position. In May 2000, de Martino arranged for O'Brien to meet with an executive coach to improve O'Brien's management skills. Despite numerous meetings with the executive coach, Lucas asserts that O'Brien's high employee turnover rate, and the negative comments about O'Brien from existing and departing employees, did not improve. O'Brien's employment with Lucas ended in May 2001. Whereas O'Brien contends that Lucas discharged her, Lucas contends that O'Brien resigned after de Martino and Mr. Lucas relieved O'Brien of her management responsibilities. The instant action ensued, and Lucas now moves for summary judgment on all claims.

II. Legal Standards

A. Summary Judgment Standards

Summary judgment is appropriate where the facts and law as represented in the pleadings, affidavits, and other summary judgment evidence show that no reasonable trier of fact could find for the nonmoving party as to any material fact. FED. R. CIV. P. 56; Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323-25, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Innovative Database Systs. v. Morales, 990 F.2d 217 (5th Cir. 1993). "The moving party bears the initial burden of identifying those portions of the pleadings and discovery in the record that it believes

demonstrate the absence of a genuine issue of material fact, but is not required to negate elements of the nonmoving party's case." Lynch Properties, Inc. v. Potomac Ins. Co. of Ill., 140 F.3d 622, 625 (5th Cir. 1998) (citing Celotex, 477 U.S. at 322-25). If the movant fails to meet its initial burden, the motion must be denied, regardless of the nonmovant's response. Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994).

If the movant does meet its burden, the nonmovant must go beyond the pleadings and designate specific facts showing that a genuine issue of material fact exists for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); Edwards v. Your Credit, Inc., 148 F.3d 427, 431 (5th Cir. 1998). A party opposing summary judgment may not rest on mere conclusory allegations or denials in its pleadings unsupported by specific facts presented in affidavits opposing the motion for summary judgment. FED. R. CIV. P. 56(e); Lujan, 497 U.S. at 888; Hightower v. Texas Hosp. Ass'n, 65 F.3d 443, 447 (5th Cir. 1995).

In determining whether genuine issues of fact exist, "factual controversies are construed in the light most favorable to the nonmovant, but only if both parties have introduced evidence showing that a controversy exists." Lynch, 140 F.3d at 625; see also Eastman Kodak v. Image Technical Services, 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992). However, in the absence of any proof, the Court will not assume that the nonmoving party could or would prove the necessary facts. Lynch, 140 F.3d at 625. A party must do more than simply show some "metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. "If the

record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Friou v. Phillips Petroleum Co., 948 F.2d 972, 974 (5th Cir. 1991).

B. TCHRA Standards

In analyzing a claim of employment discrimination under TCHRA, the Court employs the same legal standards as it would in analyzing a claim of employment discrimination under Title VII. See M.D. Anderson Hospital and Tumor Institute v. Willrich, 28 S.W.3d 22, 24, 43 Tex. Sup. Ct. J. 1175 (Tex. 2000) (holding that the Texas Legislature intended to correlate state law with federal law in employment discrimination cases). The Court evaluates discrimination claims that rely on circumstantial evidence by employing the burden-shifting approach announced in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). See West v. Nabors Drilling USA, Inc., 330 F.3d 379, 383 (5th Cir. 2003); Long v. Eastfield College, 88 F.3d 300, 304 (5th Cir. 1996). The Supreme Court developed this approach "to deal with cases in which discrimination can be proved only by circumstantial evidence." Evans v. City of Houston, 246 F.3d 344, 350 (5th Cir. 2001) (citing Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000)).

Under the burden-shifting approach, a plaintiff is first required to establish a prima facie case of discrimination. See Meinecke v. H & R Block of Houston, 66 F.3d 77, 83 (5th Cir. 1995). If the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a "legitimate, non-

discriminatory justification for its actions." Evans, 246 F.3d at 350. "If the defendant can articulate a reason that, if believed, would support a finding that the action was non-discriminatory, the mandatory inference of discrimination created by the plaintiff's prima facie case drops out of the picture and the factfinder must decide the ultimate question: whether the plaintiff has proved intentional discrimination." Id. (internal quotations omitted). In establishing this ultimate question, "the plaintiff can rely on evidence that the employer's reasons were a pretext for unlawful discrimination ..., and the factfinder may still consider the evidence establishing the plaintiff's prima facie case and inferences properly drawn therefrom." Id.

III. Analysis

As noted above, O'Brien asserts claims for discriminatory discharge and hostile work environment. The Court will now address each claim in turn. n1

A. Discriminatory Discharge

O'Brien alleges that Lucas violated TCHRA when Lucas discharged O'Brien on May 15, 2001, due to her gender. (P.'s Am. Compl. at 6-8.) Lucas, on the other hand, contends that O'Brien cannot meet her burden of establishing a prima facie case of gender discrimination or that Lucas's legitimate, non-discriminatory reason was pretext for gender discrimination. (D.s' Br. at 6-7, 9-11.)

With respect to a claim for discriminatory discharge or demotion, n2 a plaintiff must present evidence of the

following in order to establish a prima facie case of gender discrimination: (1) that the plaintiff is a member of a protected class, i.e., that the plaintiff is female; (2) that the plaintiff was qualified for the position held; (3) that the plaintiff was discharged or demoted; and (4) that after discharging or demoting the plaintiff, the employer replaced the plaintiff with a person who is not a member of the protected class, i.e., a male, or that the employer acted in some other manner to indicate that the decision to discharge or demote was based on gender. See Meinecke v. H & R Block of Houston, 66 F.3d 77, 83 (5th Cir. 1995); Waldmiller v. Continental Exp., Inc., 74 S.W.3d 116, 120 (Tex. App.--Texarkana 2002, no pet. h.). In the instant case, although there appears to be no serious dispute that O'Brien has established the first three elements, O'Brien cannot establish the fourth element of her prima facie case of gender discrimination. O'Brien has presented no competent summary judgment evidence that she was replaced by a male employee. Although O'Brien suggests in her affidavit that a male employee named Jeff Chaponick ("Chaponick") replaced her, she admitted in her deposition testimony that she had no personal knowledge that Chaponick had replaced her. n3 (P.'s App. at 8; D.s' Supp. App. at 139.) Indeed, Lucas presents evidence that two female employees--de Martino and Andrea Jennings--replaced O'Brien. n4 (D.s' App. at 6, 12.)

The Court recognizes that O'Brien's failure to establish that she was replaced by a male employee "does not necessarily mean that she has failed to establish her prima facie case of discrimination." Williams v. Trader Publishing Co., 218 F.3d 481, 485 (5th Cir. 2000). However, a prima facie case of gender discrimination

still requires at least some showing that the adverse employment action was motivated by the employee's gender. See Rubinstein v. Adm'rs of Tulane Educ. Fund, 218 F.3d 392, 400 (5th Cir. 2000) ("Discrimination suits still require evidence of discrimination."). To that end, a female employee "may use circumstantial evidence that she has been treated differently than similarly situated [male employees]." Williams, 218 F.3d at 484-85. See also Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1090 (5th Cir. 1995) (noting that, in order to state a prima facie case of discrimination, a plaintiff can show that non-protected class members were treated differently under "nearly identical" circumstances).

In the instant case, O'Brien testified during her deposition that she was treated differently than both her male and female counterparts, thereby undermining her claim that Lucas discriminated against her on the basis of gender. n5 (D.s' App. at 52.) As alluded to above, Lucas contends that it relieved O'Brien of her management duties because O'Brien suffered high employee turnover rates and because existing and departing employees had made negative comments about her. However, O'Brien states in her affidavit that certain male managers suffered even higher employee turnover rates than her and were not discharged or demoted. (P.'s App. at 2, 3, 5.) Even if the Court were to ignore the conclusory nature of her affidavit statements, O'Brien fails to present any evidence that Lucas treated these male managers differently than her under "nearly identical" circumstances. See Mayberry, 55 F.3d at 1090. For example, O'Brien testified in her deposition that she was specifically hired to expand the Executive Search

Group in Dallas. (D.s' App. at 39.) However, O'Brien fails to present any evidence that Lucas had hired the male managers with the same objective for their respective groups. Furthermore, O'Brien fails to present any evidence that existing and departing employees had made similar negative comments, both in nature and in number, about the male managers as they had made about her. Finally, O'Brien fails to present any evidence that Lucas had hired an executive coach for the male managers to improve their management skills as Lucas had done for her. Thus, O'Brien has failed to establish that Lucas discharged or demoted her--but did not discharge or demote any male manager--under "nearly identical" circumstances. See Mayberry, 55 F.3d at 1090.

Finally, O'Brien fails to present any evidence to rebut the inference of non-discrimination that arises when an employee is hired and fired by the same supervisor. See Nieto v. L&H Packing Co., 108 F.3d 621, 624 (5th Cir. 1997) ("It is unlikely that a decision maker 'would hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job.'"). The evidence before the Court establishes that de Martino and Mr. Lucas jointly participated in O'Brien's hiring and in her discharge or demotion. (D.s' App. at 2, 6.) The inference of non-discrimination is enhanced in the instant case because de Martino, a female supervisor, belongs to the same protected class as O'Brien. See Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996) ("The fact that the actor involved in both employment decisions is also a member of the protected class only enhances the inference [of non-discrimination]."). Accordingly, for all

of the above reasons, O'Brien has failed to establish a prima facie case of gender discrimination. n6

B. Hostile Work Environment

As a final matter, the Court notes that O'Brien asserts a claim for hostile work environment. (P.'s Am. Compl. at 4-5; P.'s Resp. at 17.) However, O'Brien has failed to exhaust her administrative remedies as to that claim. See Taylor v. Books A Million, Inc., 296 F.3d 376, 379 (5th Cir. 2002) (recognizing that the filing of a charge of discrimination "is a precondition to filing suit in district court"). O'Brien's Charge of Discrimination, filed with both the Texas Commission on Human Rights and the Equal Employment Opportunity Commission ("EEOC"), charges Lucas with discrimination only as to O'Brien's discharge. (D.s' App. at 137.) Significantly, the Charge of Discrimination alleges that the discrimination took place only on May 15, 2001, the date O'Brien alleges that Lucas discharged her. (Id.) Accordingly, to the extent O'Brien brings claims for any conduct other than for her discharge or demotion in May 2001, those claims are hereby DISMISSED. See Thomas v. Texas Dep't of Criminal Justice, 220 F.3d 389, 395 (5th Cir. 2000) ("The scope of a Title VII complaint is limited to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination."). See also Pineda v. United Parcel Service, Inc., 360 F.3d 483, 487 (5th Cir. 2004) (noting that Title VII and the cases interpreting it guide the reading of TCHRA).

The Court notes that even if O'Brien had exhausted her claim for hostile work environment, n7 her response to Defendants' motion for summary judgment on this

claim is wholly insufficient to raise a genuine issue of material fact. Her entire response on this claim amounts to one paragraph and cites to no evidence in support of her conclusory contention. (P.'s Resp. at 22.) Even assuming that sexual harassment existed at Lucas, O'Brien presents no evidence that she subjectively believed the harassment to be "severe or pervasive." See Frank v. Xerox Corp., 347 F.3d 130, 138 (5th Cir. 2003) ("The Plaintiff[] must subjectively perceive the harassment as sufficiently severe or pervasive, and this subjective perception must be objectively reasonable."); Hoffman-La Roche, Inc. v. Zeltwanger, 69 S.W.3d 634, 651 (Tex. App.--Corpus Christi 2002, pet. granted) ("Conduct that is not severe enough to create a work environment that a reasonable person would find hostile or abusive will not trigger Title VII or its Texas equivalent."). Finally, still assuming that sexual harassment existed at Lucas, O'Brien presents no evidence that the harassment "affected a term, condition, or privilege of employment." See Frank, 347 F.3d at 138; Garcia v. Levi Strauss & Co., 85 S.W.3d 362, 370 (Tex. App.--El Paso 2002, no pet. h.) ("A hostile work environment is one so severe and pervasive that it destroys a protected class member's opportunity to succeed in the workplace.") (internal quotations omitted). O'Brien states in her affidavit that, "despite the demeaning atmosphere, I was always a top performer." (P.'s App. at 3.) For all of the above reasons, O'Brien's claim for hostile work environment must fail.

IV. Conclusion

For the foregoing reasons, Defendants' motion for summary judgment is GRANTED, and the case is

DISMISSED. Defendants' request for attorney fees and costs pursuant to § 21.259(a) of the Texas Labor Code is DENIED.

SO ORDERED.

DATED: May 18, 2004.

BAREFOOT SANDERS, SENIOR JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

Footnotes

n1 To the extent necessary, the Court will address the parties' objections to the summary judgment evidence during the course of its analysis.

n2 As noted above, the parties differ as to the circumstances surrounding O'Brien's departure from Lucas. Whereas O'Brien contends that Lucas discharged her, Lucas contends that O'Brien resigned after de Martino and Mr. Lucas relieved O'Brien of her management responsibilities. Thus, Lucas, in effect, concedes that it demoted O'Brien before her alleged resignation. The Court need not resolve whether Lucas discharged or demoted O'Brien because, in either event, O'Brien suffered an adverse employment action. The Court's decision in this Memorandum Opinion and Order is not based on the lack of an adverse employment action.

n3 To the extent O'Brien attempts to create a genuine issue of material fact by stating in her affidavit that Chaponick replaced her, Lucas's objection to that portion of the affidavit is hereby SUSTAINED as

contradicting O'Brien's deposition testimony. See Albertson v. T.J. Stevenson & Co., Inc., 749 F.2d 223, 228 (5th Cir. 1984) ("The nonmovant cannot defeat a motion for summary judgment by submitting an affidavit which directly contradicts, without explanation, his previous testimony."). In her deposition, O'Brien testified that all she knew about her replacement was what de Martino had told her, i.e., that Chaponick would be running the office until de Martino found a replacement or figured out what to do with the office. (D.s' Supp. App. at 139.) In her deposition, O'Brien confirmed that she had no independent knowledge of who had actually replaced her. (Id.) Nonetheless, more than a year after her deposition testimony, and without explaining her newfound knowledge, O'Brien relates facts in her affidavit indicating that she has personal knowledge that Chaponick replaced her. Specifically, O'Brien states in her affidavit that, when she retrieved her belongings from her office after her discharge, she observed Chaponick in her office fulfilling her management responsibilities. (P.'s App. at 8.) O'Brien also claims that Chaponick told her that he would be replacing her. (Id.) Thus, O'Brien's affidavit contradicts, without explanation, her previous deposition testimony because it purports to relate personal knowledge regarding who replaced her when she had previously admitted during her deposition that she had no such knowledge.

n4 O'Brien objects to Paragraph 14 of Carla Roush's affidavit as hearsay. (P.'s Resp. at 2; D.s' App. at 12.) However, that paragraph contains no out-of-court statement. See FED. R. EVID. 801(c). Accordingly, O'Brien's objection to Paragraph 14 is hereby OVERRULED.

n5

"Q. Okay. So you were essentially singled out and treated differently, in your opinion, from your male and female counterparts?

"A. Yes."

(D.s' App. at 52.)

n6 Even if O'Brien had established a prima facie case of gender discrimination, Lucas presents evidence that it discharged or demoted O'Brien for legitimate, non-discriminatory reasons. As noted above, Lucas presents evidence that it discharged or demoted O'Brien due to her high employee turnover rate and due to the negative comments about her by existing and departing employees. (D.s' App. at 5-6, 141, 143-44, 147, 149-55, 157.) To the extent O'Brien objects to Lucas's evidence of these legitimate, non-discriminatory reasons on the basis of hearsay, those objections are OVERRULED under the business records exception (exit interview forms) or because they are not offered to prove the truth of the matter asserted (emails). See FED. R. EVID. 801(c), 803(6). With respect to pretext, O'Brien fails to rebut Lucas's legitimate, non-discriminatory reasons with evidence of pretext. In fact, the record before the Court is devoid of any evidence that Lucas discharged or demoted O'Brien due to her gender. Although O'Brien seems to argue that she was a better manager than her male counterparts, she presents no evidence that Lucas did not believe that they were discharging or demoting O'Brien for the stated legitimate, non-discriminatory reasons. In fact, in her deposition testimony, O'Brien agreed that she had been

discharged or demoted due to "unacceptable performance in turnover and employee complaints in the branch." (D.s' App. at 115.) The Court recognizes that O'Brien has painted an unflattering picture of Lucas's treatment of women generally; however, the Court cannot simply infer that such treatment extended to O'Brien specifically in the instance of her discharge or demotion on May 15, 2001.

n7 The Court is confident based on the evidence before it that O'Brien has failed to exhaust her administrative remedies as to her claim for hostile work environment. (D.s' App. at 137.) The Court notes that a certain deposition excerpt refers to an "addendum" to the Charge of Discrimination (D.s' App. at 52), but the "addendum" is not before this Court.

Civil No. 3:02-CV-2572-H

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

MARY O'BRIEN,
Plaintiff,

v.

LUCAS ASSOCIATES PERSONNEL, INC.
d/b/a LUCAS GROUP, and
LUCAS ASSOCIATES, INC.,
Defendants.

May 18, 2004, Filed

FINAL JUDGMENT

Consistent with the Memorandum Opinion and Order signed by the Court this day,

The Court ORDERS, ADJUDGES AND DECREES that this case be, and is hereby, DISMISSED. The Parties shall bear their own attorney fees and costs, and any relief not expressly granted herein is DENIED.

SO ORDERED.

DATED: May 18, 2004.

BAREFOOT SANDERS, SENIOR JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS